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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

## No. 569

UNITED STATES OF AMERICA, ex rel.
NICKOLAS DIANI CIRCELLA,

*Petitioner,*

*vs.*

WALTER A. SAHLI, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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# INDEX


PAGE

Petition for Writ of Certiorari ..... 1

Opinions of Court below ..... 2

Jurisdiction ..... 3

Questions Presented for Review ..... 4

Constitutional Provisions and Statutes Involved ..... 5-8

Statement of the Case ..... 9-14

Argument ..... 15-25

Conclusion ..... 26

Appendix:

I. Opinion of United States Court of Appeals for the Seventh Circuit in Case No. 11044—United States of America, ex rel. Nickolas Diani Circella v. Walter A. Sahli, etc. ..... 1a-12a

II. Judgment of Court of Appeals ..... 13a

III. Petition of Appellant for Rehearing ..... 14a-17a

IV. Order denying Petition of Appellant for Rehearing ..... 18a

V. Order Staying Issuance of Mandate ..... 19a

VI. Order Further Staying Issuance of Mandate ..... 20a


TABLE OF CASES.


Bridges v. Wixon, 326 U. S. 135 ..... 20

Fong Haw Tau v. Phelan, 333 U. S. 6 ..... 22

United States of America, ex rel. Michael Giglio v. Marcus T. Neelly, District Director, Immigration and Naturalization Service, Chicago District, 208 Fed. 2d 337 ..... 23 & 24



SEP 31 1957

235340

PAGE

Jordan v. De George, 341 U. S. 223 .....15, 18, 22

Russian Volunteer Fleet v. United States, 282 U.S. 481 ..... 16

Wong Yang Sung (1949) 339 U. S. 33 ..... 66

UNITED STATES CONSTITUTION.

Amendment V ..... 5

FEDERAL STATUTES.

Title 28, U.S.C.A. 1254 ..... 3

Title 8, U.S.C.A. Section 155(a) of the Immigration Act of February 5, 1917, Section 19 .....4, 5, 10, 18

Title 8, U.S.C.A. Section 1251(a)(4) of the Immigration and Nationality Act of 1952 ..... 8

Title 8, U.S.C.A. Section 1251(b) of the Immigration and Nationality Act of 1952 .....4, 8, 19

RULE CITED.

Rule 19(b) of Supreme Court of the United States ..... 3

OTHER AUTHORITIES.

2 American Jurisprudence Section 9, Pages 467-468 .... 16

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Nickolas Diani Circella, prays the Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause and the order denying the petition for rehearing therein, and, for cause, show:

### OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, delivered

October 21, 1953, is reported in 115 F. Supp. 615-628 and appears on pages 414-434 of the printed record, nine copies of which have been filed.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 216 Fed. (2nd) 33. It appears in the appendix (pp. 1a-12a).

## JURISDICTION.

The date of the judgment sought to be reviewed, which was also the time of its entry, was October 12, 1954. (App., p. 13a)

The date of the order denying the petition for rehearing was November 16, 1954. (App. p. 18a)

The date of the order staying the issuance of the mandate was November 23, 1954. (App. p. 19a)

The date of the order further staying the issuance of the mandate was December 18, 1954. (App., p. 20a)

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is Title 28 U.S.C.A. 1254, as amplified by that part of Rule 19(b) of this Court which provides that this Court will, in considering the question whether it should grant a review on Writ of Certiorari, consider cases in which a Court of Appeals "has decided an important question of federal law which has not been, but should be settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court."

## QUESTIONS PRESENTED FOR REVIEW.

Was Petitioner deprived of due process of law because he was neither apprised nor forewarned of the conse-

quences of his alleged crimes, to-wit: deportation, since neither the Immigration Act of 1917 nor the Immigration and Nationality Act of 1952 were in effect at the time of the alleged convictions and sentences?

Was Petitioner deprived of due process of law because he was precluded from seeking a recommendation from the judge imposing sentence that Petitioner be not deported, in pursuance of Title 8 Section 155(a) of the Immigration Act of 1917 and Title 8 Section 1251(b) of the Immigration and Nationality Act of 1952, as neither Act was in existence at the time of the alleged convictions and sentences?

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

United States Constitution: Amendment V:-

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Title 8 U.S.C.A. Sec. 155(a) (now repealed). (Immigration Act of February 5, 1917, Sec. 19).

> "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the

United States in violation of this chapter, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who, after May 1, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the pro-

visions of section 138 of this title; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner of Immigration and Naturalization, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Attorney General, be taken into custody and deported. The marriage to an American citizen of a female of the sexually immoral classes the exclusion or deportation of which is prescribed by this chapter shall not invest such female with United States citizenship if the marriage of such alien female shall be solemnized after her arrest or after the commission of acts which make her liable to deportation under this chapter. The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter; nor shall any alien convicted as aforesaid be deported until after the termination of his imprisonment. The provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States; and shall also apply to the cases of aliens who come to the mainland of the United States from the insular possessions thereof. Any person who shall be arrested under the provisions of this section, on the ground that he has entered or

been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of the right claimed, shall be deported to the place specified in such other law. In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

Title 8 U.S.C.A. Sec. 1251 (a)(4) and (b). (Immigration and Nationality Act of 1952, Public Law 414, Sec. 241(a)(4) and (b)).

"(a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether the convictions were in a single trial."

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter."

## STATEMENT OF THE CASE.

Petitioner filed in the United States District Court for the Northern District of Illinois a petition for a Writ of *Habeas Corpus* in this cause, challenging his detention by the Respondent on the ground that the Respondent's detention was allegedly illegal and unconstitutional. Respondent's custody was predicated upon a warrant of deportation charging the Petitioner with having been convicted of a crime involving moral turpitude prior to his alleged entry into the United States on February 2, 1929 under the Immigration Act of 1917, and of having been convicted of two crimes involving moral turpitude after his alleged entry on January 26, 1902 into the United States under the Immigration and Nationality Act of 1952. The District Court held, after a hearing, that the Petitioner was accorded a fair, adequate hearing before the Immigration Department, that there was no error found therein, and that there was no contravention of the United States Constitution therein. The District Court ordered that the Writ of *Habeas Corpus* be dismissed and Petitioner remanded to the custody of the Respondent.

Nickolas Diani Circella, Petitioner, was arrested after a warrant for arrest of alien dated October 1, 1952, issued by the Immigration and Naturalization Service, United States Department of Justice, in which it was stated that the Petitioner was subject to be deported pursuant to the following provisions of law and for the following reasons, to-wit: "The Act of February 5, 1917, in that he has been convicted of a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, to-wit: assault to murder." Title 8 U.S.C.A., Sec. 155 (R. 313-314).

Thereafter notice of hearing before the Immigration and Naturalization Department at Chicago, Illinois, on

October 9, 1952 was given to Petitioner (R. 314-315). A continued hearing was conducted before Elliott A. Berman, Special Inquiry officer, on January 12 and 13, 1953 (R. 64-282). At that time motions were made to quash the warrant and dismiss the proceedings by counsel for Petitioner (R. 65-71). The Department proceeded with hearing upon the charge of the warrant that Petitioner had been convicted of crime prior to entry, to-wit: Assault to murder (R. 64-282).

The Department offered evidence, which was objected to by counsel for Petitioner, that he was an alien, fifty-four years old, married male, who was born in St. Bartholomeo, Italy, on August 24, 1898, and who entered the United States at New York, New York, on January 26, 1902 (R. 47); that on September 14, 1916, the Petitioner was convicted in the Criminal Court of Cook County, Illinois, under the name of Mike Circella of the crime of assault with intent to murder, for which he was sentenced to the Illinois State Reformatory at Pontiac for an indeterminate period of years (Tr. 152); that subsequently on February 2, 1929, he made a trip by plane to Bimini in the Bahamas, and returned therefrom to Miami, Florida, on the same day; that on April 7, 1942, Petitioner was convicted in the United States District Court for the Southern District of New York of the crime of conspiracy to interfere with trade and commerce by violence, threats and coercion in violation of Section 420 (a), (b), (d) of Title 18 of the U. S. Code (R. 152). Petitioner objected to all evidence propounded by the Department relative to the charges, but Petitioner on advice of counsel declined to testify.

At the conclusion of said hearing, the Department lodged an additional charge against the Petitioner in that he was unlawfully in the United States, in violation of

Section 241 (a)-4 of the Immigration and Nationality Act, in that after entry, to-wit: January 26, 1902, Petitioner had been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, to-wit: assault with intent to murder and conspiracy to interfere with trade and commerce by violence, threats and coercion in violation of Title 18, Section 420 (a), (b), (d) of the U. S. Code, and continued the hearing to March 24, 1953 on the lodged charge (R. 152-154). On April 14, 1953, the Special Inquiry Officer entered an order that Petitioner be deported on the charge contained in the warrant of arrest and on the lodged charge (R. 47-56).

An appeal therefrom was taken by Petitioner to the Board of Immigration Appeals and on August 3, 1953, the Board entered an order dismissing the appeal of Petitioner (R. 294). On August 10, 1953, Marcus T. Neelly, District Director of the Chicago District of the Immigration Service, issued a warrant of deportation against Petitioner based on the charge of the original warrant of arrest and the lodged charge (R. 295-296). Soon thereafter counsel for Petitioner had informed the District Director that he intended to petition the District Court for the Northern District of Illinois for a Writ of *Habeas Corpus* when Petitioner would be restrained of his liberty and was informed by the District Director that according to the regular practice followed by the Service, a petition might be filed at the time of Petitioner's arrest, and that an opportunity to file a petition would be accorded to Petitioner by the Service at the time of his arrest (R. 339, 356-357). Petitioner at no time had ever attempted to avoid arrest by the Service (R. 420).

On September 14, 1953, Petitioner and his attorney, Thomas M. Tracey, arrived at the offices of the Immigration and Naturalization Service (R. 338-339, 353). Mr. Tracey had arranged by telephone an appointment at said offices with a Mr. Cushman, an officer of the Service (R. 338, 356). Mr. Cushman had clearly informed Mr. Tracey that the Service did not intend to take Petitioner into custody for immediate deportation at that time, and merely desired a conference concerning Petitioner's bond (R. 338-339, 356). Despite the said assurance, the District Director then informed Mr. Tracey that Petitioner would be taken into custody and deported to Italy (R. 339, 354). After an unsuccessful attempt to dissuade Mr. Neelly from this action, Mr. Tracey informed Mr. Neelly he intended to petition the District Court immediately for Writ of *Habeas Corpus* on behalf of Petitioner (R. 339-340, 354, 357-358).

At that time Mr. Tracey served upon Mr. Neelly a typewritten notice that he would appear before a Judge of the District Court for the Northern District of Illinois to present a petition for a Writ of *Habeas Corpus* on behalf of Petitioner. Despite the service of said notice (R. 12, 339-340, 357-358, 361-362, 321-322), Petitioner was seized, and one of the representatives of the Service endeavored forcibly to put the coat of Petitioner over his neck, choking him, and finally forcibly placed handcuffs on Petitioner (R. 344). Then Petitioner was forcibly removed from the Building of the Service and placed in an automobile (R. 344-345). In the interim, counsel for Petitioner filed a petition for a Writ of *Habeas Corpus* on behalf of Petitioner in the District Court (R. 4-12). Thereafter Petitioner was returned via automobile to the New Post Office Building as his custodians had returned to retrieve certain documents relating to the deportation

procedure (R. 345-6). Petitioner then was forcibly taken out of the jurisdiction of the United States District Court for the Northern District of Illinois to Hammond, Indiana, situated in the Northern District of Indiana, and placed in a cell (R. 346-348). A Writ of *Habeas Corpus* was issued by Judge Barnes of the District Court commanding Respondent to produce the body of Petitioner before said Court on September 21, 1953 (R. 13-18). Later that evening Petitioner, still in handcuffs, was placed on the Mohawk of the New York Central Railroad in Gary, Indiana, though the Mohawk orginates in and departs from Chicago, Illinois, passes through Gary, and terminates its run in New York, New York. Petitioner in custody was brought to and detained at Ellis Island in the Southern District of New York (R. 348-349).

On September 15, 1953, a petition for a Writ of *Habeas Corpus* was filed on behalf of Petitioner in the District Court of New York and a hearing on the petition and the order to show cause was held before the Honorable Alexander Holtzoff on Septemebr 22, 1953 (R. 296). The hearing consumed about fifteen minutes of court time, and most of those fifteen minutes were devoted to a discussion of the propriety of Petitioner's removal from Chicago by the Immigration Service (R. 296-312). Counsel for Petitioner argued the merits of his case for about five minutes. Judge Holtzoff denied the petition for Writ of *Habeas Corpus* but remarked that the Immigration Authorities in Chicago "evidently thought that the Government would not get as good a hearing in Chicago as it would in New York" (R. 296-312).

On September 21, 1953, Respondent appeared before Judge Campbell and filed his Return to the Writ (R. 439). The Return stated in substance that at the time the writ issued, Respondent did not have custody of Peti-

tioner and that Petitioner was in custody of the Immigration Service in New York and that Petitioner there had filed a petition for a Writ of *Habeas Corpus* (R. 439).

Judge Campbell then disapproved of the manner in which Petitioner was summarily transported from the Northern District of Illinois after petition for Writ of *Habeas Corpus* was filed therein (R. 19-29). On September 28, 1953, Petitioner's case was again called before the District Court; the United States Attorney then stated that the Department of Justice planned to produce Circella before the District Court in obedience to the writ issued by Judge Barnes on September 14, 1953. Further the United States Attorney asked leave of Court to withdraw the Return filed by Respondent, challenging the jurisdiction of the District Court (R. 30); leave was granted and the Respondent was ordered to file a second Return meeting the petition on its merits (R. 30). That Return was then filed and Petitioner also filed a Traverse to the Return (R. 33-47, 315-321). On October 14, 1953, a hearing before Judge Campbell was held (R. 336-414) and on October 21, 1953, Judge Campbell read his memorandum opinion in court and entered his findings of fact, conclusions of law and judgment order, by which order the Writ of *Habeas Corpus* was dismissed and Petitioner remanded to the custody of Respondent (R. 414-457). The District Court permitted Petitioner to remain at large on his bond, heretofore filed (R. 457).

The judgment was affirmed by the United States Court of Appeals for the Seventh Circuit (Appendix p. 13a). Petition for Rehearing was denied on November 16, 1954 (Appendix p. 18a).

Federal jurisdiction was asserted in the petition for Writ of *Habeas Corpus* filed in the District Court in that the order and warrant of deportation was illegal, void, contrary to law and the Constitution of the United States, and based on findings, conclusions and recommendations of the Special Inquiry Officer which were not supported by reasonable, substantial and probative evidence and which were contrary to Federal law and due process of law.

## ARGUMENT.

The United States Court of Appeals for the Seventh Circuit has decided herein federal questions in conflict with applicable analogous decisions of this Court and raised questions of federal law which should be settled by this Court.

In the case of *Jordan* v. *De George*, 341 U.S. 223 at page 230, Chief Justice Vinson in the majority opinion in discussing the statute relative to deportation based on the conviction and sentence of the requisite two crimes expressly set forth two rules to protect an alien from unconstitutional deprivations of due process of law. Relative to the said statute, the Court stated:

1) "Its function is to apprise aliens of the consequences which follow after conviction and sentence of the requisite two crimes."
2) "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

Therefore an alien not to be deprived of due process must, under the two rules as above set forth, first be apprised of the consequences if he should violate the statute relative to deportation and, secondly, be warned by the statute as to the proscribed conduct.

Appellant, however, was not and could not have been apprised of the consequences if he violated the statute, nor was he nor could he have been warned by the statute as to the proscribed conduct. The alleged conviction of the appellant of a crime involving moral turpitude was on September 14, 1916 when he was a boy 18 years of age, though the alleged commission of the crime was on

July 14, 1916 when he was only 17 years of age. On September 14, 1916, the Immigration Act of 1917 was not even in existence and did not come into existence until February 5, 1917. Thus, there was no physical possibility of Petitioner being apprised or forewarned of the consequences of his act in July 14, 1916, and because of this failure to be so apprised or forewarned Petitioner was unconstitutionally deprived of due process of law.

This Court has time after time stated that aliens are entitled to due process of law. *Wong Yang Sung,* (1949) 339 U.S. 33. It is further stated in *2 American Jurisprudence,* Sec. 9, pages 467-468: "It is likewise well settled that an alien may demand that he be accorded due process of law by the Federal Government." Aliens are accorded due process of law under the Fifth Amendment to the Constitution. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481.

What has been said relative to depriving Petitioner of due process of law is likewise applicable to the alleged conviction on April 7, 1942. The Immigration and Nationality Act of 1952, passed by the 82nd Congress as Public Law 414 took effect 180 days after the date of its enactment, which was on June 26, 1952 (Sec. 407 of the Act). Consequently this law was not in existence and effect in April 7, 1942, the date of the alleged conviction under the lodged charge. Again it was physically impossible for Petitioner to be apprised and forewarned of the consequences of his act, with the consequent result of unconstitutional deprivation of due process of law.

In the evidence introduced by the Immigration Department to prove the alleged convictions of Petitioner for two crimes involving moral turpitude, it will be noted that the plea in both instances was guilty. Petitioner nor

his counsel could know the consequences of the plea of guilty in either instance. Petitioner and his counsel could not have known on September 4, 1916 of the possible deportation of Petitioner under a plea of guilty as they were not cognizant of the provisions of an Act which had not yet come into existence, to wit: on February 5, 1917. The same principle also is applicable to the alleged plea of guilty and conviction on April 7, 1942 of Petitioner. Petitioner and his counsel could not have known in 1942 of possible deportation when the Immigration and Nationality Act of 1952 under which he might be deported was not even in existence. If it is a deprivation of due process of law for an alien not to be apprised and forewarned as above stated, how much more is it a deprivation of due process of law where an alleged alien's counsel is unable to advise and instruct him of the legal consequence of his plea of guilty, namely deportation, because the Acts under which he may be deported are not even in existence and effect.

Deportation proceedings extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation, but neither Petitioner nor his counsel did know and could not know of the additional punishment of deportation included in the sentence at the time of the pleas of guilty, for the reasons above stated.

Justice Jackson, supported by Justice Black and Justice Frankfurter in a dissenting opinion in the above case of *Jordan* v. *De George,* 341 U.S. 223, 243 expressly stated:

> "Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additonal punishment of deportation. If respondent were a citizen, his aggregate sentences

of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from which has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty."

The Congress fully realized that deportation proceedings extended the criminal process of sentencing to include on the same convictions an additional punishment of deportation and in both the Immigration Act of 1917 and the Immigration and Nationality Act of 1952 explicitly set forth provisions to protect an alien from the additional penalty of deportation.

In Title 8 U.S.C.A. Sec. 155(a), now repealed (Immigration Act of February 5, 1917, Sec. 19), it was provided:

"* * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed of the court, or judge, thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this chapter."

Thus it will be seen that the Congress did not make compulsory the deportation of an alien convicted of a crime or moral turpitude but on the contrary made it mandatory on the Attorney General that an alien must not be deported if the court imposing the judgment or passing sentence recommends to the Attorney General that the alien be not deported. It will further be noted that the Congress did not make deportation or non-

deportation in this instance a matter of discretion with the Attorney General as generally provided but made it mandatory on the Attorney General that an alien be not deported if the court so recommends.

The Congress later, in repealing the Immigration Act of 1917 and passing the Immigration and Nationality Act of 1952, continued its desire to protect an alien convicted of a crimes involving moral turpitude and extended to the alien the same protection afforded to an alien under the Immigration Act of 1917.

In Title 8 U.S.C.A., Sec. 1251(b), it is stated:

> "The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of an alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the Court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien shall not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities who shall be granted an opportunity to make representations in the matter."

The Petitioner herein was denied this valuable protection, this important right, as Petitioner on September 14, 1916 could not ask or apply to the Court at the time of his alleged conviction and sentence for a recommendation of the Court that he be not deported. The Immigration Act of 1917 giving Petitioner this right was not in existence. Petitioner, a boy of 18 years then, is heavily penalized by witholding from him this privilege and is denied due process of law.

To like effect, Petitioner was denied this right of applying to the Court for a recommendation that he be not deported in April 7, 1942. Petitioner could not seek the Court's recommendation as these provisions of the Immigration and Nationality Act of 1952 were not in effect and existence on April 7, 1942, the date of the alleged second conviction. Here, likewise, Petitioner was denied this right intended for him by the Congress. The Immigration Department thus in endeavoring to deport Petitioner first under the original charge under the Immigration Act of 1917 and then under the lodged charge under the Immigration and Nationality Act of 1952, has deprived Petitioner of these rights and privileges given him by the Congress and in both instances has deprived him of due process of law guaranteed by the Constitution.

*Bridges* v. *Wixon,* 326 U.S. 135, contains language by the majority as follows at page 154:

> "Though deportation is not technically a criminal proceeding, it visits a great hardship in the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness."

Judge Murphy concurring in the majority opinion said at pages 163, 164:

> "It is no answer that a deportation proceeding is technically noncriminal in nature and that a deportable alien is not adjudged guilty of a 'crime.' Those are over-subtle niceties that shed their significance when we are concerned with safeguarding the ideals of the Bill of Rights. The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sen-

> tence. A deported alien may lose his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution and even death. There is thus no justifiable reason for discarding the democratic and humane tenets of our legal system and descending to the practice of despotism in dealing with deportation."

It cannot be said that the procedure by which Petitioner is to be deprived of his liberty and his home meets the essential standard of fairness. If, as this Court has stated above, we are concerned with safeguarding the ideals of the Bill of Rights and we are to use the democratic and humane tenets of our legal system to protect Petitioner, he should be given the protection afforded him by the Congress. The penalty of deportation is implicit as part of the judgment and sentence when the provision of Section 155 of Title 8 U.S.C.A. is considered. Neither Petitioner nor his counsel could comprehend the consequences of his pleas of guilty would include deportation because, as aforestated, neither Immigration Act was in existence. Nor could Petitioner's counsel or the sentencing judge adequately inform Petitioner of the consequences of his plea, for the Immigration Acts were not in effect. The right to consideration of the possibility of deportation and of seeking the recommendation of the sentencing judge would have been most important to Petitioner and the loss of such consideration was vitally prejudiced.

Both Petitioner and his counsel, in order that his client might be properly advised, should have the right to know the consequences of a plea of guilty under due process of law. Here they could not know and, in addition, they were deprived of the right and procedure to seek the sentencing judge's recommendation of non-deportation. This does not meet the "essential standards of fairness"

nor "the democratic and humane tenets of our legal system." It deprives Petitioner of the due process of law offered him by the United States Constitution.

It has been expressly held in *United States of America ex rel Michael Giglio* v. *Marcus T. Neelly, District Director, Immigration and Naturalization Service, Chicago District,* in a memorandum opinion decided November 9, 1952, by His Honor Philip L. Sullivan, District Judge, case No. 51C 2110 (not reported in Fed. Supp.), and affirmed in the United States Court of Appeals for the Seventh Circuit as case No. 208, Fed. 2d 337, as follows:

> "The issue in this case is whether an alleged alien can be lawfully deported under the provisions of Section 155, Title 8, U.S.C.A. for conviction and sentences to terms of more than one year imprisonment, on two occasions, for crimes alleged to involve moral turpitude, where the Petitioner on one occasion was not afforded assistance of counsel, and on the second occasion did not intelligently waive assistance of counsel, and in neither instance was the Petitioner aware that he was liable to deportation as a result of his pleas of guilty, and the Courts were not advised of such liability to deportation, and no action was taken by said Courts at the time of sentence or within thirty days thereafter with regard to recommendation to the Attorney General regarding deportation.
>
> "Petitioner is not subject to deportation. In the first conviction petitioner entered a plea of guilty without counsel and without the assistance of counsel. In the second conviction although counsel was offered, petitioner declined such assistance. However, such action by petitioner was *without knowledge on his part of the consequences of a plea of guilty, to wit, deportation.* The second crime of which petitioner was convicted did not involve moral turpitude and therefore fails to meet the requirements of the depor-

tation statute requiring conviction of a crime involving moral turpitude. Petitioner was unlawfully detained under the deportation warrant. He is not subject to deportation. Writ of habeas corpus to issue discharging the petitioner."

There the Court held that an alien was not subject to deportation where he pleaded guilty in two instances, as here, and in neither instance was he aware that he was liable to deportation as a result of his pleas of guilty, as here, and the Courts were not advised of such liability to deportation, as here, and no action was taken by said Courts at the time of sentence or within thirty days thereafter with regard to recommendation to the Attorney General regarding deportation, as here. It must be noted the Court expressly stated "that such action by petitioner was without knowledge on his part of the consequences of a plea of guilty, to wit, deportation." Petitioner here also had not knowledge and could not have had, as stated aforesaid, of the consequences of his plea of guilty, to wit, deportation, nor were the Courts advised of petitioner's liability to deportation and no action was taken by said Courts relative to a possible recommendation of non-deportation. As Judge Sullivan stated in the *Giglio* case, petitioner here was unlawfully detained under the deportation warrant. He is not subject to deportation.

The principles set forth in the cases by this Court pertaining to deportation of Communists are not applicable herein because the Congress as shown above has granted and given to aliens convicted of a crime or crimes involving moral turpitude, protection, rights, and privileges against deportation not accorded to Communists and to take from an alien so convicted the privilege of asking the convicting court for a recommendation that he be not deported, constitutes an unconstitutional deprivation of due process of law.

This Court in *Fong Haw Tau* v. *Phelan*, 333 U.S. 6, page 10, has said:

> "We resolve the doubts in favor of that construction (a liberal construction) because deportation is a drastic measure and at times the equivalent of banishment or exile. *Delagadillo* v. *Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

Likewise to Petitioner deportation is a drastic measure and is banishment and exile. It is as Justice Jackson said, "a life sentence of exile from which has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty." *Jordan* v. *De George*, 341 U.S. 223, 243.

Petitioner under due process of law should have been apprised and forewarned of the consequences which follow after conviction and sentence of the requisite crime or crimes involving moral turpitude. In addition, Petitioner under due process of law should have been accorded the right to apply to court imposing judgment for a recommendation that he be not deported and to know the consequence of his plea. To deny Petitioner this constitutes a deprivation of due process of law guaranteed Petitioner under the Constitution.

## CONCLUSION.

WHEREFORE: Petitioner prays that the Writ of Certiorari may issue out and under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding that Court to certify, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 11044, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Seventh Circuit may be reversed by this Court.

Respectfully submitted,

NICKOLAS DIANI CIRCELLA,
*Petitioner,*
By: THOMAS M. TRACEY,
*His Attorney.*

Chicago, Illinois,
January 27, 1955.

## APPENDIX I.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11044. October Term and Session, 1954.

United States of America ex rel. Nickolas Diani Circella,
Petitioner-Appellant,
vs.
Walter A. Sahli, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

October 12, 1954.

Before Major, Lindley and Swaim, *Circuit Judges.*

Swaim, *Circuit Judge.* The relator, Nickolas Diani Circella, filed in the United States District Court for the Northern District of Illinois a petition for a writ of habeas corpus alleging that his detention by Marcus T. Neelly, the District Director of Immigration and Naturalization, United States Department of Justice, was illegal and in violation of relator's constitutional rights.

The relator was taken into custody by the respondent on a warrant for relator's arrest which charged that he was subject to deportation under the 1917 Immigration Act, 8 U. S. C. A. (1940 Edition) § 155(a), because he had been convicted prior to his entry into the United

State of assault with intent to murder, an offense involving moral turpitude. At the conclusion of the hearing on this first charge the Service lodged an additional charge that relator was also subject to deportation under the Immigration and Nationality Act of 1952, 8 U. S. C. A. § 1251, *et seq.*, because he had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, which crimes were committed after his entry into the United States in 1902. The second crime was conspiracy to interfere with trade and commerce by violence, threats and coercion in violation of the Anti-Racketeering Act, former Title 18 U. S. C. A. § 420(a), repealed in 1948.

In the hearing conducted before a special inquiry officer concerning the deportation, evidence was offered by the Service to show that the relator was born in Italy, August 24, 1898; that he first entered the United States on January 26, 1902; that he had never been naturalized; that his first conviction of a crime was on September 14, 1916, in the Criminal Court of Cook County, Illinois, which was an assault with intent to murder; and that on his conviction of this crime relator was sentenced to the Illinois State Reformatory at Pontiac for an indeterminate number of years. On February 2, 1929, the relator made a trip by plane from Miami, Florida, to Bimini in the Bahamas, returning to Florida on the same day. It was also shown that on April 7, 1942, relator was convicted of the crime of conspiracy to interfere with trade and commerce by violence, threats and coercion in violation of 18 U. S. C. A. § 420(a).

On April 14, 1953, the special inquiry officer who conducted the hearing entered an order that the relator be deported on the original charge and on the lodged charge. The relator's appeal from this order was, on August 3, 1953, dismissed by the Board of Immigration Appeals.

On September 10, 1953, Marcus T. Neelly, the respondent, issued a warrant of deportation against the relator. Shortly thereafter counsel for the relator notified the respondent that there would be a petition for a writ of

habeas corpus filed on behalf of the relator and was informed by the respondent that such a petition might be filed at the time the relator was arrested. On September 14 the relator and his attorney, pursuant to an arrangement made with Mr. Cushman, an officer of the Immigration Service, went to the office of the Immigration and Naturalization Service for a conference with Mr. Cushman concerning the relator's bond. In a telephone conversation Mr. Cushman had informed the relator's attorney that it was not the purpose of the Service to arrest the relator for immediate deportation. However, on their arrival at the Service office the relator was immediately placed under arrest and he and his attorney were informed that the relator was to be immediately deported to Italy. At that time counsel for the relator informed Mr. Neelly that he intended to immediately petition the United States District Court for the Northern District of Illinois for a writ of habeas corpus and served on Mr. Neelly a typewritten notice to that effect. Without paying any regard to the notice that a petition for a writ of habeas corpus was to be filed the respondent caused the relator to be handcuffed, removed from the building and placed in an automobile to be transported to Hammond, Indiana. After the relator had been taken from the building his attorney proceeded to the United States District Court and at 12:05 P. M. filed the petition for a writ of habeas corpus. Shortly thereafter, at 12:08 P. M., the relator was returned by automobile to the building where the Service maintained its offices in order that relator's custodians might pick up certain necessary papers relating to his deportation. The relator was then taken to Hammond, Indiana, out of the jurisdiction of the United States District Court for the Northern District of Illinois. At Hammond, Indiana, the relator was placed in a detention cell to await a train to New York. That same afternoon at 2:05 P. M., a writ of habeas corpus was issued by Judge Barnes of the United States District Court for the Northern District of Illinois commanding the respondent to produce the body of the relator before that court on September 21, 1953. That evening about five o'clock the

relator was placed on a New York Central train which originated in Chicago, taken to New York City, New York, and detained at Ellis Island in the Southern District of New York.

On September 15, 1953, a petition for a writ of habeas corpus was filed on behalf of the relator in the United States District Court for the Southern District of New York. The petition in that court was denied after a very brief hearing.

On September 21, 1953, the respondent filed his return to the writ of habeas corpus, stating that at the time the writ was issued the respondent did not have custody of relator but that relator was then in the custody of the Immigration Service in New York.

On September 28, 1953, relator's case was again called before the United States District Court for the Northern District of Illinois and at the time the United States Attorney asked leave to withdraw the return which had been filed by his office challenging the jurisdiction of the court. This leave was granted and the United States Attorney was thereupon ordered to file a return meeting the petition on its merits, which he did. To this the relator filed a traverse and thereafter a hearing, at which the relator was present, was held before Judge Campbell of that court. Judge Campbell rendered a memorandum opinion, and entered findings of fact and conclusions of law and an order dismissing the writ of habeas corpus. *United States ex rel. Circella* v. *Neelly*, 115 F. Supp. 615. From this order the relator prosecutes this appeal.

On this appeal the relator states that the United States District Court for the Northern District of Illinois had jurisdiction to issue the writ of habeas corpus on September 14, 1953, and the United States Attorney agrees that the jurisdiction of that court is not in question. Of course, the parties cannot bestow jurisdiction by agreement, *Ahrens* v. *Clark*, 335 U. S. 188, 193, but we also agree that the court, under the facts of this case, had jurisdiction. At the time the petition for habeas corpus was filed the relator, Circella, in charge of two subor-

dinates of the respondent, Neelly, was still in the territorial jurisdiction of the United District Court for the Northern District of Illinois. His subsequent removal by the respondent to Indiana did not rob the Illinois court of jurisdiction. *Ex Parte Endo,* 323 U. S. 283, 305.

It is true, as counsel for the relator states, that the 1917 Immigration Act was expressly repealed by the Immigration and Nationality Act of 1952, but it is also true that the provisions of the 1917 Act here involved were saved by Section 405 of the 1952 Act. 8 U. S. C. A. (Copyright 1953) § 1101, Note Page 156.

The relator next attacks the conclusion of the special inquiry officer that the relator was subject to deportation because, prior to his entry into the United States, he had been convicted of assault with intent to murder. The relator attacks this conclusion because it is based on the finding that the relator "entered" the United States by plane at Miami, Florida, on February 2, 1929. The evidence to support this finding was, first, the testimony of the pilot who flew the plane from Miami to Bimini and back on February 2, 1929. The pilot testified that on that trip he transported Circella and three other passengers. The witness identified the relator in the courtroom as the Circella who made that trip. The Government manifests of the trip also showed that a man by the same name as the relator and who was born on the same day as the relator was one of the passengers on the trip. Although Circella was present in the courtroom during the taking of the testimony concerning the trip he did not deny that he was the Circella who was one of the passengers on that trip.

The Supreme Court has defined entry as used in the 1917 Act as including "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *United States ex rel. Volpe* v. *Smith, Director of Immigration,* 289 U. S. 422, 425. In the instant case, as in the *Volpe* case, the alien departed from the United States, went to foreign land and returned to the United States, knowingly and

voluntarily. The 1952 Act has adopted this definition by expressly defining entry as meaning "any coming of an alien into the United States from a foreign port or place or from an outlying possession." 8 U. S. C. A. § 1101 (a)(13).

The relator also complains of the admission into evidence of Exhibits 8, 13, 14 and 15 by the special inquiry officer in the hearing to determine whether the relator was subject to deportation. Exhibit 8 was the relator's official registration as an alien, a document signed and sworn to by the relator December 11, 1940. It showed that he was born in and was still a citizen of Italy, and that he had been convicted of a crime and sentenced to imprisonment in the Illinois State Reformatory at Pontiac, Illinois, for from one to fourteen years. Exhibit 8 also included an application for certificate of identification sworn to and signed by relator on February 17, 1942. Exhibit 13 was relator's signed petition for naturalization filed with the Immigration and Naturalization Service on June 15, 1940. Exhibit 14 was a statement by relator for purposes of naturalization signed and sworn to before two naturalization examiners on April 1, 1941, admitting that he was sentenced to one to fourteen years in the Pontiac Reformatory for "robbery" on September 21, 1916. Exhibit 15 was an affidavit of relator as petitioner for naturalization, stating that he thought his father had been naturalized and that relator acquired citizenship through him, but that at his father's death he found no naturalization certificate and inquiry disclosed no record of his father's naturalization.

The only reason given for the nonadmissibility of these exhibits is that relator was not warned at the time the documents were signed and sworn to by him that they might later be used against him in a deportation proceeding. As authority he cites *Bridges* v. *Wixon,* 326 U.S. 135, in which the Supreme Court held that the Immigration Service must abide by its own rules in deportation cases. The Court there further held that certain exhibits were improperly admitted because they didn't comply with Rule

150.1(c) of the Regulations of the Immigration and Naturalization Service, 8 C. F. R. (1941 Supp.) 150.1(c).

The 1952 revision of Title 8 C. F. R. contains no § 150.1 but all of that section's requirements are now incorporated in § 242.11(c) which reads as follows:

> "Whenever, in the *course of an investigation*, information is obtained which indicates that the person investigated is subject to arrest and deportation, and it is desired to use such information as evidence in support of an application for a warrant of arrest, such information shall be reduced to writing either in narrative or question-and-answer form and signed by the person furnishing the information. Whenever such recorded statement is to be obtained from any person, the investigating officer shall * * * (2) warn the person that any statement made by him may be used as evidence against him * * *." (Emphasis added.)

Relator cites this section in his brief and claims that it is controlling in his situation. We do not agree with him. The rule is addressed to investigating officers "in the course of an investigation" to uncover information that would justify a warrant of arrest. The documents here in question were made many years prior to this deportation proceeding or any investigation leading to it. There is nothing on the face of this rule that would affect the admission of documents made and sworn to by the deportee years before any investigation as to his deportability. This situation is covered by another rule, Title 8 C. F. R. § 242.54(b), which provides that:

> "The special inquiry officer may enter of record any statement, oral or written, which is material and relevant to any issue in the case, previously made by the respondent or any other person during any investigation, examination, or hearing."

Under this rule the prior written statements of relator signed and sworn to by him were admissible.

The relator also insists that the immigration authorities were required to prove that he was an alien before

a valid order for his deportation could be made and that they failed to sustain this burden of proof which the law placed upon them. This contention cannot be sustained. Granted that alienage must be proved, the evidence here was more than sufficient. The evidence included the sworn statements of the relator in various official documents which we have discussed above. In addition to these sworn documents showing his alienage, the relator was present at the hearing and on the advice of counsel refused to testify on the question, and no other evidence was presented by him to controvert the evidence which was presented by the Government on this question. It must be remembered that this was not a criminal case where the failure of the defendant to testify could not be considered against him. This was a civil proceeding and the relator's failure to testify and to deny the charge that he was an alien corroborated the Government's evidence. In *Bilokumsky* v. *Tod*, 263 U. S. 149, 154, the Supreme Court held that: "Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien." In *Mahler* v. *Eby*, 264 U. S. 32, the Supreme Court again held that where the alien in a deportation case had refused, on advice of counsel, to testify on a certain point there could be an inference that his testimony if given would be against him.

The relator also insists that the evidence fails to show that he did not become a citizen through the naturalization of his father. Exhibit 15 was an affidavit by the relator to the effect that his father had at one time told the relator that he, the father, had been naturalized and that the relator was thereby made a citizen. The affidavit also discloses, however, that after the father's death the relator looked through his effects and found no such record. Relator then wrote to New York to see if there was

a naturalization record for his father but none could be found. On this question the Government introduced Exhibit 20 which was a certificate made by the Chief of the Information, Mail and Files Section of the Immigration and Naturalization Service that the Service was unable to find any record of the father's naturalization. All of this certainly made a *prima facie* case for the Service. In the absence of any evidence to the contrary nothing more was required.

The relator insists that the order for his deportation was erroneous and contrary to law because it overlooked "the obvious fact that Congress in enacting Sec. 241(a)(4) of the Immigration and Nationality Act of 1952 did not and could not possibly intend to apply the same to minors." To sustain this contention the relator points out that at the time he was convicted of his first crime in 1916 he was only eighteen years of age and that the 1952 Act provides, Section 212(a)(9) [8 U. S. C. A. § 1182 (a)(9)], that an alien who has committed only one crime while under the age of eighteen years may under certain conditions be granted a visa and permitted to enter this country. This provision has no application to relator and furnishes no reason for his not being deported under the clearly applicable provisions of either the 1952 Act or the 1917 Act. If the Congress had intended that aliens who had committed crimes when they were minors should be treated differently as to deportation these Acts would have so provided.

The relator also contends that the Immigration Department, because of its long delay in instituting deportation proceedings, is now estopped from deporting the relator. There is no merit in this contention. The Congress, of course, could have provided a period of limitations within which time deportation proceedings must be brought, but this was not done as to either of the grounds on which the relator was ordered deported. In the absence of such a statutory provision the mere failure of the officers of the Immigration Service to act sooner in this deportation proceeding could not be held to estop them from acting. 19 Am. Jur., pages 818, 819. Another complete answer

to this claim by the relator is found in the fact that in some of the documents he filed with the Service he concealed some of the facts which authorized his deportation. Such concealment of the true facts also precludes his resorting to the equitable ground of estoppel.

The relator's final contention is that the Immigration and Nationality Act of 1952 is unconstitutional. He contends that this Act as well as the 1917 Act is unconstitutional because the use of the phrase "involving moral turpitude" to describe the type of crimes the commission of which is to make an alien subject to deportation makes the law "void for vagueness." The Supreme Court decided this question against the relator in *Jordan* v. *DeGeorge,* 341 U. S. 223. The Court there said, pages 231-2, that the descriptive phrase, "involving moral turpitude," conveys "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

The administration of the Act by the Immigration Service is not, as relator contends, an unconstitutional delegation of power. In *Carlson* v. *Landon,* 342 U. S. 524, 537, the Supreme Court said: "The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.'"

The relator also contends that both the 1917 Act and the 1952 Act, as they have been applied to him, are unconstitutional because, as to him, they are *ex post facto* in that his deportation under these Acts is based upon crimes which he committed before their enactment. This question has long since been decided against the contention of the relator. Since deportation statutes are not criminal they cannot be *ex post facto.* "There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct. *Mahler* v. *Eby,* 264 U. S. 32; *Ng Fung Ho* v. *White,* 259 U. S. 276, 280; *Bugajewitz* v. *Adams,* 228 U. S. 585; *Fong Yue*

*Ting* v. *United States,* 149 U. S. 698, 730." *Eichenlaub* v. *Shaughnessy,* 338 U. S. 521, 529. The fact that actions to deport are not criminal and that the Supreme Court has said that deportation, therefore, does not constitute punishment also answers the relator's contention that his deportation would constitute "cruel and unusual punishment."

In speaking of the Alien Registration Act of 1940 the Supreme Court recently said in *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 594: "However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the *ex post facto* provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislalation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrines as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them."

The relator also contends that since these Acts apply to alians retroactively they do not treat all aliens alike. Those convicted after their enactment may petition the court in which they were convicted for a recommendation of the court against their deportation. 8 U. S. C. A. § 155(a) (1942 Edition) and 8 U. S. C. A. § 1251(g). If the court makes such a recommendation it is mandatory upon the Attorney General. *United States* v. *Hughes,* 3 Cir., 116 F. 2d 613. Of course, aliens convicted before the passage of these Acts had no opportunity to apply for such recommendations. The relator says that by reason of this fact he had been denied "due process" under the Fifth Amendment. In *Fong Yue Ting* v. *United States,* 149 U. S. 698, 707, the Supreme Court said: "The right of a nation to expel or deport foreigners, who have not been naturalized • • • rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their en-

trance into the country." And in *Mahler* v. *Eby*, 264 U. S. 32, 39, the Court said: "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments."

During the pendency of this appeal Walter A. Sahli succeeded Marcus T. Neelly as District Director of Immigration and Naturalization and on his motion he was substituted as respondent-appellee in this appeal.

The judgment of the District Court is

AFFIRMED.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX II.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, October 12, 1954.

Before

Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

United States of America ex rel. Nickolas Diani Circella,
Petitioner-Appellant,

No. 11044 vs.

Walter A. Sahli, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

## APPENDIX III.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11044

United States of America ex rel. Nickolas Diani Circella,
Petitioner-Appellant,

vs.

Walter A. Sahli, District Director of Immigration and Naturalization, U. S. Department of Justice, Chicago, Illinois,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable William J. Campbell, Judge Presiding.

### PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

Nickolas Diani Circella, petitioner-appellant, by his attorney, Thomas M. Tracey, respectfully petitions that a rehearing be allowed in the above-entitled cause.

As grounds therefore, it is respectfully submitted that this Honorable Court in its opinion did not consider and apply the principles, norms and rules set up by the majority opinion in the case of *Jordan* v. *De George*, 341 U. S. 223 at 230, 232 to protect an alien, like petitioner-appellant, herein under the various Immigration Acts passed by Congress against unconstitutional deprivations of due process of law.

It is true this Honorable Court did consider in its opinion on page 9 the contention of petitioner-appellant relative to the "void for vagueness doctrine" as applied to

the term "involving moral turpitude", and this Honorable Court also did consider on page 10 of its opinion the contention of petitioner-appellant that he had been denied "due process" under the Fifth Amendment by applying the Immigration Act of 1917 and the Immigration and Nationality Act of 1952 retroactively in that all aliens are not treated alike by denying to those convicted before their enactment the right to petition the sentencing Judge for a recommendation of the Court against their deportation.

However there was a further contention of petitioner-appellant relative to due process not passed upon by this Honorable Court in its opinion, namely: The United States Supreme Court has ruled in the case of *Jordan* v. *De George* 341 U. S. 223 at 230, 232:

1. That an alien like petitioner-appellant must be *apprised* of the consequences which follow after conviction and sentence of the requisite two crimes —otherwise there is an unconstitutional deprivation of due process of law.
2. That an alien like petitioner-appellant must be *forewarned* of the consequences resulting from conviction and sentence of the requisite two crimes— otherwise there is an unconstiutional deprivation of due process of law.

It was expressly stated by Chief Justice Vinson in the majority opinion of the said case of *Jordan* v. *De George*, 341 U. S. 223 at page 230 in discussing the statute relative to deportations based on the conviction and sentence of the requisite two crimes in so far as the rule of apprising the alien:

> "ITS FUNCTION IS TO APPRISE ALIENS OF THE CONSEQUENCES WHICH FOLLOW AFTER CONVICTION AND SENTENCE OF THE REQUISITE TWO CRIMES."

Further Chief Justice Vinson is setting forth the rule of warning the alien stated as follows:

"THE TEST IS WHETHER THE LANGUAGE CONVEYS SUFFICIENTLY DEFINITE *WARNING* AS TO THE PROSCRIBED CONDUCT WHEN MEASURED BY COMMON UNDERSTANDING AND PRACTICES."

Thus under the two rules laid down by the United States Supreme Court, petitioner-appellant was deprived of due process of law under the Fifth Amendment to the United States Constitution as petitioner-appellant was never apprised nor was he ever forewarned of the consequences which follow after conviction and sentence of the requisite two crimes under the Immigration and Nationality Act of 1952 or the requisite one crime under the Immigration Act of 1917 as neither act was in effect at the time of the alleged convictions and sentences to so apprise petitioner-appellant as well as to so definitely warn him, to-wit: The alleged conviction and sentence in September, 1916 antedated the Immigration Act of 1917 and the alleged conviction and sentence is April, 1942 antedated the Immigration and Nationality Act of 1952.

A resident alien is entitled to due process of law—*Wong Yang Sung* (1949) 339 U. S. 33. It is further stated in 2 American Jurisprudence Sec. 9 Pages 467-468: "It is likewise well settled that an alien may demand that he be accorded due process by the Federal Government". Aliens are accorded due process of law under the Fifth Amendment to the Constitution. *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481.

This Honorable Court on page 10 of its opinion stated: "In *Fong Yue Ting* v. *United States,* 149 U. S. 698, 707, the Supreme Court said, 'The right of a nation to expel or deport foreigners, who have not been naturalized • • • rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country." And in *Mahler* v. *Eby,* 264 U. S. 32, 39, the Court said: 'The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments'."

However as stated above a resident alien is entitled to the safeguards provided by the due process clause of the United States Constitution. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government but in the enforcement of these policies the safeguards of due process must be respected. Again and again the United States Supreme Court has demanded that resident aliens be protected by due process and as heretofore stated the safeguards of due process of apprising and forwarning petitioner-appellant of the consequences after conviction and sentence of the requisite crime or crimes should and must be applied herein to protect petitioner-appellant fully under the due process clause of the United States Constitution.

## CONCLUSION.

Petitioner-appellant respectfully submits that for the reasons hereinbefore enumerated the opinion of this Court ought to be modified and changed and the judgment dismissing the Writ of Habeas Corpus should be reversed.

Respectfully submitted,

THOMAS M. TRACEY,
*Attorney for Petitioner-Appellant.*

## ATTORNEY'S CERTIFICATE.

The undersigned, attorney for petitioner-appellant, Nickolas Diani Circella, does hereby certify that the above Petition for a Rehearing is well founded in law and is not submitted for delay.

THOMAS M. TRACEY,
*Attorney for Petitioner-Appellant.*

## APPENDIX IV.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, November 16, 1954

Before

Hon. J. Earl Major, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

United States of America ex rel. Nickolas Diani Circella,
Petitioner-Appellant,

No. 11044 vs.

Walter A. Sahli, District Director, etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

## APPENDIX V.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Tuesday, November 23, 1954
Before
Hon. H. Nathan Swaim, Circuit Judge

United States of America ex rel. Nickolas Diani Circella,
Petitioner-Appellant,

No. 11044 vs.

Walter A. Sahli, District Director, etc.,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On motion of counsel for petitioner, it is ordered that the issuance of the mandate of this Court in this cause be, and the same is hereby, stayed pursuant to the provisions of Rulle 25 (b) of the Rules of this Court.

## APPENDIX VI.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
Saturday, December 18, 1954
Before
Hon. J. Earl Major, Circuit Judge

United States of America ex rel. Nickolas Diani Circella, Petitioner-Appellant,

No. 11044 vs.

Walter A. Sahli, District Director, etc., Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On motion of counsel for Petitioner-Appellant, it is ordered that the issuance of the Mandate of this Court in this cause be, and the same is hereby, further stayed to and including the 31st day of January, 1955, pursuant to the provisions of Rule 25 of the Rules of this Court.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 2 |
| Statement | 5 |
| Argument | 8 |
| Conclusion | 13 |


## CITATIONS


Cases:

| | |
|---|---|
| *Carlson* v. *Landon*, 342 U. S. 524 | 9, 12 |
| *Fong Yue Ting* v. *United States*, 149 U. S. 698 | 11 |
| *Galvan* v. *Press*, 347 U. S. 522 | 11, 13 |
| *Harisiades* v. *Shaughnessy*, 342 U. S. 580 | 11, 13 |
| *Jordan* v. *DeGeorge*, 341 U. S. 223 | 11 |
| *Mahler* v. *Eby*, 264 U. S. 32 | 11 |
| *Marcello* v. *Bonds*, No. 145, this term | 12, 13 |
| *Nishimura Ekiu* v. *United States*, 142 U. S. 651 | 11 |
| *Tiaco* v. *Forbes*, 228 U. S. 549 | 11 |
| *Turner* v. *Williams*, 194 U. S. 279 | 11 |
| *Volpe, United States ex rel.* v. *Smith*, 289 U. S. 422 | 10 |

Statutes:

| | |
|---|---|
| Immigration Act of 1917, 39 Stat. 874, Section 19, as amended | 2, 6, 8, 9, 10 |
| Immigration and Nationality Act of 1952, 66 Stat. 163: | |
| Section 241 | 3, 8, 9 |
| Section 403 (a) (13) | 6 |
| Section 405 (a) | 4, 6 |




332931—55

# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 569

UNITED STATES OF AMERICA, EX REL. NICKOLAS DIANI CIRCELLA, PETITIONER

*v.*

WALTER A. SAHLI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, U. S. DEPARTMENT OF JUSTICE, CHICAGO, ILLINOIS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a–12a; R. 470–480) is reported at 216 F. 2d 33. The opinion, findings of fact and conclusions of law of the District Court (R. 437–457, see also R. 414–434) are reported at 115 F. Supp. 615.

### JURISDICTION

The judgment of the Court of Appeals (Pet. 13a; R. 481) was entered on October 12, 1954, and a petition for rehearing was denied on No-

vember 16, 1954 (Pet. 18a, R. 482). The petition for a writ of certiorari was filed on January 31, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in that the conviction which formed the basis for his deportation under Section 19 of the Immigration Act of 1917, as amended, occurred prior to the enactment of the 1917 Act.

2. Whether petitioner was denied due process of law in that the two convictions which formed the basis for his deportation under Section 241 of the Immigration and Nationality Act of 1952 occurred prior to the enactment of the 1952 Act.

## STATUTES INVOLVED

Section 19 of the Immigration Act of 1917, 39 Stat. 874, 889, as amended, 54 Stat. 671 and 54 Stat. 1238,[1] 8 U. S. C. (1946 ed.) 155 (a), in pertinent part, provides:

> SEC. 19. (a) * * * except as hereinafter provided, any alien * * * who is hereafter sentenced more than once to * * * a term of imprisonment [of more than one year] because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to

[1] The amendments did not alter, in any respect here material, the provisions of Section 19 herein set forth.

> entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall upon the warrant of the Attorney General, be taken into custody and deported: * * * *Provided further,* That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * *

Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204, 8 U. S. C. 1251, in pertinent part, provides:

> SEC. 241. (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> * * * * *

(b) The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply * * * (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Section 405 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 280, 8 U. S. C. 1101, note, in pertinent part, provides:

SEC. 405. (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention,

petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [sic], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

## STATEMENT

Petitioner seeks review of the judgment of the court below affirming the dismissal of a petition for a writ of habeas corpus which he filed, on September 14, 1953, in the District Court for the Northern District of Illinois, after he had been taken into custody for deportation (R. 4). The facts pertinent to the issues raised in the petition for certiorari may be summarized as follows:

Petitioner, an Italian citizen, first entered the United States at New York in January 1902 (R. 47–48, 50; see also R. 143). In September 1916, he was convicted in Illinois of assault with

intent to murder (R. 48, 99–100, 152). In 1929, he made a brief visit to the Bahamas and returned to the United States at Miami, Florida, this being the second of the two occasions when he entered this country (R. 105–106). In 1942, he was convicted in the United States District Court for the Southern District of New York of conspiracy to interfere with trade and commerce in violation of the federal Anti-Racketeering Act (R. 54).

Deportation proceedings were instituted against petitioner in October 1952, by the issuance of an immigration warrant of arrest which charged that petitioner was subject to deportation pursuant to Section 19 (a) of the Immigration Act of 1917,[2] in that, prior to his last entry into the United States in 1929, he had in 1916 been convicted of assault with intent to murder, a crime involving moral turpitude (R. 313–314). In January 1953, an additional charge was lodged against petitioner (R. 152–153), alleging that he was also deportable under Section 241 (a) (4) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1251 (a) (4), on the basis of his convictions, subsequent to his first entry into the United

[2] Section 19 (a) of the Immigration Act of 1917 was repealed by Section 403 (a) (13) of the Immigration and Nationality Act of 1952, 66 Stat. 279, 8 U. S. C. 155, effective December 24, 1952. However, the deportation proceedings, which were instituted before the repeal date, are not affected by the repeal. See Section 405 (a) of the 1952 Act, *supra*, pp. 4–5.

States in 1902, of the two crimes, described above, involving moral turpitude but not arising out of a single scheme of misconduct (R. 152–153).

Hearings were held in October 1952 and in January and March 1953 (R. 56–168). Petitioner rested his case without taking the stand, calling any witnesses, or offering any evidence (R. 168). On April 14, 1953, the hearing officer submitted his report, together with findings of fact and conclusions of law, and ordered that petitioner should be deported on the basis of both the 1917 Act charge and the additional 1952 Act charge (R. 47–56). On August 3, 1953, petitioner's appeal to the Board of Immigration Appeals was dismissed (R. 283–294), and, on August 10, 1953, a warrant of deportation was issued (R. 295–296).

Petitioner thereupon began habeas corpus proceedings (R. 4–11), challenging the validity of the deportation order on the grounds, *inter alia*, that the Immigration and Nationality Act of 1952 was violative of the due process clause, that the 1917 Act was inapplicable to convictions occurring in 1916, and that he could not, as permitted by the 1917 Act, have petitioned the sentencing court at the time of the 1916 sentence for recommendation against deportation.

The District Court denied the petition (R. 457), and the Court of Appeals affirmed (R. 481).

ARGUMENT

The only question raised by the petition for certiorari is whether the two statutes, under which petitioner has been ordered deported, are unconstitutional on grounds of due process, in so far as they make convictions prior to their enactment a basis for deportation. However, review in this Court of this due process question is unnecessary since (1) the question is not properly presented on the facts of this case; and (2) in any event the decision below is both correct and in complete harmony with established constitutional principles enunciated by this Court.

1. *The question is not properly presented on the facts of this case,* since petitioner's deportation on the 1917 Act charge rests on adequate and independent grounds which do not give rise to petitioner's due process claim.

Petitioner's deportation was ordered under two different statutes, each involving a different occasion when he "entered" the United States. The first ground for his deportation was unlawful presence in this country under Section 19 (a) of the 1917 Act, as amended, 8 U. S. C. (1946 ed.) 155, based upon his one felony conviction "prior to [his 1929] entry." The second was unlawful presence under Section 241 (a) (4) of the 1952 Act, 8 U. S. C. 1251, based upon his two convictions of crimes involving moral turpitude committed "at any time after [his 1902] entry." Only as to the 1952 Act charge might petitioner's

due process claim be properly asserted. However, this is not sufficient to bring it before the Court, on the facts of this case, since the deportation order must in any event be affirmed under the 1917 Act findings, as to which, as is shown immediately below, the due process claim is not properly presented.

The alleged due process violation stems from the claimed retrospective operation, as to petitioner, of both Acts, on the ground that he was not informed by statute, at the time of his 1916 and 1942 convictions, that they might be made a basis for his deportation.[8] As is shown *infra*, pp. 10–13, this contention, even if properly presented, would be without merit, since this Court has already settled the point against petitioner. See especially *Carlson* v. *Landon*, 342 U. S. 524, 536–537. However, the question is not even reached on this record, since petitioner was in fact put on notice by the 1917 Act, at the time he left the United States in 1929, that on his subsequent reentry into the United States he would be subject to deportation on the basis of any prior

[8] Petitioner claims to have been deprived of an opportunity to seek a recommendation from the sentencing judge that the convictions not be used as grounds for deportation. Provision for seeking such a recommendation was made by Section 19 (a) of the 1917 Act and Section 241 (b) of the 1952 Act. However, the inclusion of this opportunity to mitigate the effect of a conviction was purely a matter of legislative policy. The failure to include a provision of this type cannot give rise to any possible violation of constitutional standards.

felony conviction.[4] Thus the 1917 Act is not retrospective in application to petitioner who voluntarily left and re-entered the United States in 1929. Petitioner's situation is essentially the same as that of the alien whose deportation was unanimously upheld by this Court in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, where the alien had, subsequent to a single conviction of the type covered by the 1917 Act, voluntarily left the country for less than one day.

2. *The decision below is correct* and in complete harmony with established constitutional principles. Thus, even if petitioner's due process claim were to be treated as properly presented, there would still be no occasion for this Court to review the decision below. Petitioner's argument is merely a method of contending that Congress may not deport aliens for reasons which were not grounds for deportation at the time the acts which form the basis of deportation were committed.[5] As the court below pointed out

[4] Under the 1917 Act, deportation based on a crime committed "prior to entry" was neither limited to those committed in the United States nor to those committed after some particular date.

[5] Another facet of the same argument is petitioner's assertion that he was denied due process because neither in 1916 nor in 1942 would he have had reason to request the sentencing court to recommend against deportation. See fn. 3, *supra*, p. 9. This is not wholly true of the 1942 conviction. While in and of itself, it was not a basis of deportation, the 1917 Act did in 1942 give warning that two

(Pet. 11a), this contention has "been considered closed for many years and a body of statute and decisional law has been built" upon the contrary principle.

Congress has very broad powers with respect to deportation. *Harisiades* v. *Shaughnessy*, 342 U. S. 580. In permitting an alien to enter the country, the government merely accords him a revocable privilege or license to reside here. Regardless of the length of his residence or the propriety of his conduct while residing here, neither the Fifth Amendment nor any other provision of the Constitution confers on an alien a vested right to remain in the country. *Galvan* v. *Press*, 347 U. S. 522; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Mahler* v. *Eby*, 264 U. S. 32; *Tiaco* v. *Forbes*, 228 U. S. 549; *Turner* v. *Williams*, 194 U. S. 279; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Nishimura Ekiu* v. *United States*, 142 U. S. 651.*

The statutes under which petitioner's deportation order was issued are based on rational find-

convictions for crime would result in deportation. Petitioner, as to that crime, was in no different position from any alien presently convicted of one crime more than five years after entry. As to the 1916 conviction, petitioner was, as we have pointed out, aware that he had an unpardoned conviction when he left the United States in 1929.

* In *Jordan* v. *DeGeorge*, 341 U. S. 223, on which petitioner relies, this Court did not hold otherwise; it merely indicated that, in specifying the class to be deported, Congress is required to make its intention clear.

ings that petitioner is presently an undesirable alien. Past conduct is used as a means of defining the class of aliens whom Congress has concluded are presently undesirable. As this Court stated in *Carlson* v. *Landon,* 342 U. S. 524, 536–537:

> They are deported for what they are now, not for what they were. Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.

The statutes are thus clearly in accord with due process.

3. We call the Court's attention to the case of *Marcello* v. *Bonds,* No. 145, this Term, now pending on certiorari, in which Marcello has included, in addition to various points wholly unrelated to those here raised, a constitutional argument based on the *ex post facto* clause of the Constitution. This contention is in certain respects relevant to the issue here raised. However, in the light of

*Harisiades* v. *Shaughnessy,* 342 U. S. 580, *Galvan* v. *Press,* 347 U. S. 522, and the other decisions herein cited, this constitutional issue is so unsubstantial that there appears to be no reason to delay disposition of the present petition pending a decision in *Marcello,* even if the first ground for denying the petition, *supra,* pp. 8–10, should not be deemed to be decisive.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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